





IN THE MATTER OF THE HUMAN RIGHTS CODE,
S.O. 1981, C. 53, AS AMENDED

AND IN THE MATTER OF the complaint, as
amended, by Ms. Mira Heincke against Kenneth
Brownell and Emrick Plastics, a Division of
Windsor Mold Inc.

Board of Inquiry: Berend Hovius

Appearances: For the complainant: Ms. R. Vovydic

For the respondents: Mr. L. Balen

For the Ontario
Human Rights Commission: Mr. R. Charney
Ms. V. Lawson

Hearings: 9 March, 29 June and 8 December, 1988.
25 April and 7 July, 1989.
30 January, 28 May, 30 May, 20 August and
22 August, 1990.

DECISIONIntroduction

These proceedings arose out of a complaint filed by Ms. Mira Heincke (the complainant has since adopted Branton, her husband's surname, as her surname but I will refer to her as Ms. Heincke for convenience throughout these reasons) alleging that her right to equal treatment with respect to employment without discrimination because of sex as guaranteed by s. 4 (1) and s. 10 of the Human Rights Code, S.O. 1981, C. 53 was infringed by Mr. Kenneth Brownell and Emrick Plastics, a Division of Windsor Mold Inc. On February 19, 1988 I was appointed by the then Minister of Citizenship, the Hon. Jerry Phillips, to act as a Board of Inquiry to hear and decide the matter.

The hearing was commenced on 9 March 1988. On consent of the parties it was adjourned to July 4. On June 29, at the request of the Commission and with the consent of all parties, I postponed the resumption of the hearing until December 12 to permit an adequate hearing to be held and, in particular, to await the Supreme Court of Canada decision in Brooks v. Safeway Canada. That case, which was clearly relevant to the issues raised by the complainant, involved the question whether discrimination on the basis of pregnancy constituted discrimination on the basis of sex. On December 8, 1988, again at the request of the Commission and with the consent of all parties, I postponed resumption of the hearing until May 1, 1989 because the complainant had been ill and the Supreme Court of Canada decision referred to earlier had still not been issued. Resumption of the hearing was postponed once more on April 25, 1989 until July 10. All of the parties agreed that this postponement was appropriate in light of the fact that Ms. Heincke had just given birth by caesarean section and would not be able to attend the hearing in early May. On July 7, the matter was adjourned sine die because Ms. Heincke was seriously ill and in hospital. At that time it was unclear when Ms. Heincke would be well enough to attend a hearing. When I was informed in January 1990 that Ms. Heincke was able to attend a hearing at any time, I resumed the hearing by conference call on the 30th of that month and May 28th was selected as the day on which I would begin to hear evidence. The parties presented their evidence and arguments on May 28, May 30, August 20, and August 22. I have set out this chronology of the proceedings in some detail to indicate that none of the parties was to blame for the unfortunate and lengthy delay between my appointment and the hearing of the evidence.

The Facts

Emrick Plastics manufactures plastic automotive parts, primarily parking light and tail light assemblies. In 1985 there were about 175 hourly employees, the vast majority of whom were women. Some seventy percent of the plant's floor space was devoted to plastic injection moulding while the rest consisted of a decorating facility which I will refer to as the paint room. In the paint room there were fourteen spray booths where employees spray painted the plastic parts. The paint room was separated from the rest of the work area by a wall of concrete blocks, glass and dry wall. Directly outside the paint room were two packing stations where the parts were loaded onto and taken off of conveyer belts. There were some five openings of various sizes in the wall to permit parts to move into and out of the paint room. There were also three doors into the paint room.

Ms. Heincke began working for Emrick Plastics in December, 1983. Although she worked on a moulding machine for a few months during the early part of her employment with the company and occasionally did some packing, hot stamping and sonic welding, her primary job was that of spray painter. During the week of February 25, 1985 she was absent from work because of severe nausea. She visited Dr. Ziter, her family physician, and discovered that she was pregnant. Dr. Ziter, on learning that Ms. Heincke worked as a spray painter, gave her a note which read:

May return to work March 4/85. Please allow patient (who is pregnant) to work in another area where no paint fumes will be inhaled.

Ms. Heincke presented this note to her supervisor who gave it to Mr. Brownell, the Plant Manager.

Mr. Brownell discussed the situation with his superior, Mr. Henry, the Assistant General Manager. A decision was taken to move Ms. Heincke into the packing area. Ms. Heincke worked as a packer for approximately three weeks. By all accounts her work as a packer was completely satisfactory. She would have been content to remain in that job until she began pregnancy leave. However, on March 22 Mr. Brownell informed her that the doctor's note was too vague and requested that she provide "better documentation as to what would be allowable in her condition".

Ms. Heincke next provided a note from Dr. Jasey, her obstetrician, dated March 27. It read:

Is pregnant. It is advisable for her to work in an area where the concentration of paint fumes is less than in the area where she spray paints.

Dr. Jasey testified at the hearing that he advised Ms. Heincke not to spray paint and provided her with this note because he "felt

that the risk of organic solvents from spray painting could be harmful to her and to the fetus that she was carrying, and that it would be in their best interest to be working in an area where she would not be exposed to these solvents." In particular, he believed that two solvents commonly used in paint, Methyl Ethyl Ketone and Toluene, could cause congenital abnormalities if absorbed in sufficiently high concentrations. He also believed that the severe nausea experienced by Ms. Heincke in February was probably related to the exposure to solvents. Although he did not know what the concentration of solvents was in the painting area, he concluded that Ms. Heincke should work outside the paint room as a precautionary measure.

Ms. Heincke gave the note from Dr. Jasey to her supervisor who again passed it on to Mr. Brownell. The latter discussed the situation with Mr. Henry and then drafted a letter which was presented to Ms. Heincke later on March 27. This letter informed Ms. Heincke that the doctors' letters were "too vague to allow us to permit you to work in any area of the plant, since we cannot guarantee the level of fumes in these areas." The letter also indicated that she was granted a leave of absence not to exceed nine months and that she could return to work no sooner than six weeks after delivery. The final paragraph said:

If this is not acceptable to you, we suggest you contact your doctor(s) to arrange for a visit to the plant so they can be more specific as to which area(s) are acceptable to them.

Both Mr. Brownell and Mr. Henry testified that this action was taken because of a concern regarding fumes in the packing area. Having been alerted to the dangers of organic solvents to the health of Ms. Heincke and the child she was carrying, they were worried that such solvents might also be present in the packing area and elsewhere in the plant. I will return later in these reasons to the factual basis, if any, for this concern.

On March 28, Ms. Heincke obtained another note from Dr. Jasey which read:

Mira may continue to work but in an area outside the paint booths. She may work in the packing area.

Although he had been invited to visit the plant, Dr. Jasey felt that such a visit was unnecessary and would not have revealed to him the level of harmful solvents in any area of the plant. From his discussion with Ms. Heincke he knew that the paint room was physically separated from the rest of the plant by a wall and that it had a separate ventilation system. Although he suspected that there might be some paint fumes from time to time in the packing area, he believed that the fumes and solvents would be concentrated in the paint room and that the air quality in the packing area

would not present any undue risk to Ms. Heincke and the child. This belief was reinforced by the facts that Ms. Heincke had been working in that area for some weeks without any repetition of her earlier bouts of nausea and that none of his other patients who worked outside the paint room at Emrick Plastics had ever complained of headaches or dizziness caused by their work.

The second note from Dr. Jasey was again the subject of discussion between Mr. Brownell and Mr. Henry. They concluded that the decision to require Ms. Heincke to take an immediate leave of absence without pay should stand. Again, they testified that they were concerned about the quality of the air in the packing area and elsewhere in the plant. They stated that they gave little weight to Dr. Jasey's suggestion that Ms. Heincke could continue to work as a packer because they felt that the doctor did not have enough information upon which to make a judgement.

On April 2, Ms. Heincke filed a grievance under the collective agreement protesting the company's decision requiring her to take a leave of absence without pay. The grievance was never resolved through the settlement process. Nor was it submitted to arbitration. Instead, the union decided to pursue the matter during negotiations for a new collective agreement. In October 1985 a new agreement came into effect. It contained a clause which was specifically inserted at the union's insistence to cover future situations comparable to Ms. Heincke's:

Art. 26.03: An employee who becomes pregnant and is exposed to chemicals or substances that are causing medical problems certified to by the employee's doctor will be removed upon request from her job and moved to another work area where work is available which the employee is able to perform. The Company will make reasonable efforts to accommodate employees in such situations.

Since 1985 at least two pregnant spray painters who provided the specified doctor's certification have been accommodated under this provision by being moved out of the paint room and given work such as packing and sonic welding.

During March of 1985 the company was arranging testing of the air quality in various parts of the plant. Mr. Henry testified that the decision to request air sampling was prompted by a field visit report from the Ministry of Labour following a routine visit in March which noted the presence of strong fumes in the paint room. The concerns raised by Ms. Heincke also played a part in this decision.

On April 12, Dr. Malik and Dr. Siu from the Ministry visited the plant and Dr. Malik prepared a Consultant Field Visit Report in

consultation with Dr. Siu. This report was dated April 26, 1985. In it the doctors made two preliminary recommendations regarding the spray painting operation:

Spray painting is carried out in adequately exhausted spray booths, but exposure to solvents is likely because of bounce back. Corrective action is required to contain such exposure.

Respirator program needs to be improved and formalized.

They also made the following comments about the paint room or decorating area as it was referred to in the report:

1. Some of the moulded parts which need painting and further decorating are sent to the decorating area measuring approximately 30,000 sq. ft. with a 15-20' ceiling height. This area is designed to be kept at approximately 10% positive pressure to ensure a dust free environment. There are four make up air units of approximate rating of 25,000 CFM each. There are thirteen 8' paint booths and one 12' paint booth, with exhaust capabilities of 8,000 CFM and 12,000 CFM respectively.
2. Material Safety Data Sheet for the spray paints were given to the Ministry of Labour. Numerous types of organic solvent are listed in various proportions. The common ones are: Butyl Cellusolve, Diisobutoketone, Methyl Ethyl Ketone (MEK), Mineral Spirits, Toluene and VM & P Naphtha.

Exposure to organic vapours, in general, can produce symptoms of headache, nausea and dizziness. If the concentration of organic vapour is high, such exposure can produce narcosis, disorientation, confusion of mentation and seizures.

Currently, little is known about the effect of organic vapours have on human pregnancy. Animal studies have indicated that with exposure to MEK and toluene, there is an association with increased risk of malformation in the offspring. It is difficult to extrapolate such animal studies in human situation. There is no known adverse reproductive effects on pregnant workers exposed to the other solvents indicated above.

3. The parts to be painted are removed from the belts, placed on a table inside the booth and spray painted. Although the exhaust provided at the booth appeared adequate, worker protection was not considered adequate. The workers were being exposed to mist and vapours due to bounce back after initial impact. The extent of such an exposure is dependent largely on the work habits, placing of the work piece in the booth, spray gun pressure and the face velocity of the booth. To quantitatively assess and evaluate such exposures, air monitoring has been carried out and the results when received will be commented on.
4. Until the exposures at the spray booths are defined, appropriate respiratory protection is necessary. At the time of this visit, some of the workers were using NIOSH approved organic vapour cartridge respirators. However, one of the workers was observed using a nuisance dust disposable mask.

Discussions during the visit left a distinct impression that a well organized respirator program was not in

operation. It appeared to have been left up to individuals to take care of their needs.

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5. The templates used at the spray booths are cleaned in wash tanks measuring 6' x 2'. These tanks are equipped with spray nozzles. The templates to be cleaned are added to the tank, the lid is closed and the solvent sprayed on. After the cleaning is completed, the cleaned templates are manually removed.

The solvents used at this work site may be MEK, butyl cellulose, diisobutoketone, mineral spirits, toluene or VM & P. The solvents vary to some extent as the company has been experimenting with different cleaners.

One person is assigned to this job and attends to 6 such units. When the lid was opened, a very strong odour was felt. High exposures for short durations are likely at this operation.

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7. Although employees working at the spray booth are likely to be exposed to solvent vapours, the general area concentration of these solvents in the decorating area is likely to be insignificant. This judgement is based on the amount of solvents observed to be escaping the capture at the booths, the total ventilation provided and the size of the room.

Although the decorating area is kept under 10% positive pressure, the amount of solvents escaping into the other areas of the plant is judged to be minimal. An occupational exposure to solvents outside the decorating area is not likely.

Dr. Sui explained each paragraph of this report in his oral testimony. Significantly, he stated that spray painters will always be exposed to some solvents no matter how good the exhaust system may be. He said that this exposure can be reduced, but not eliminated, by good work practices and the right type of respirator. He estimated that a respirator containing an organic vapour cartridge can, if properly worn and maintained, reduce the amount of organic vapour inhaled by up to 90%. He also noted that there would be some exposure to the solvents when the mist that bounced back from the product being painted contacted the skin.

The effects of "bounce back" were also dramatically described by Ms. Heincke in her evidence. Although she wore a respirator, rubber gloves and a smock, the exposed areas of her body such as her face and neck would eventually be covered with paint: "...if you were painting black, your face was black. If you were painting grey, your face was grey." She also indicated that, despite the respirator, she would frequently notice the presence of paint when she blew her nose.

In his comments on the Report of April 26, Dr. Siu reiterated that his observation of the Emrick Plastics plant in 1985 caused him to conclude that only employees working at the spray booths were likely to be exposed to any significant concentration of organic solvents. In particular, he stated that the exposure outside the paint room would be minimal. He acknowledged that some of the air within that room would be forced out because it was kept under 10% positive pressure to ensure a dust free environment inside, but explained that the bounce back effect would be limited to the area within the booth. The quality of the air throughout most of the paint room would not be significantly affected and it was this "general air" which would be forced out of the room to mix with air in the rest of the plant.

Sometime in May, 1985 the company received a copy of the Exposure Assessment Report dated May 16. That Report summarized the findings of the air quality testing done at Emrick Plastics. It revealed that the highest level of toluene detected in the paint room was inside Paint Booth #6 where the concentration was 24 parts per million in one sample. The highest level of methyl ethyl ketone detected in the paint room was again inside Paint Booth #6 where the concentration was 48 parts per million in one sample. Air samples were also taken at three different times at three places adjacent to the paint room. The highest readings detected at these three places was 2 parts per million for toluene and 5 parts per million for methyl ethyl ketone. The report was accompanied by a Consultant Comment, authored by Dr. Malik, which stated:

The results indicate all measured exposures are well below respective Threshold Limit Values and even when combined effects of mixtures are concerned, an occupational exposure is not indicated.

These results are unexpectedly low and do not coincide with the observations by the author or the sampling technician. A repeat sampling including bulk sampling will be carried out at a later date.

It should also be noted that the Report itself stated that only one-half of the paint booths were in operation when the test was conducted and that this was an unusual situation.

On May 31, a copy of this Report was sent to Ms. Heincke along with a letter indicating that her doctor should review the Report so that he could evaluate the air quality in the plant. The letter also stated:

You will be allowed to return to work in the same position upon providing a letter from your doctor that absolves Emrick Plastics and its management from any and all responsibility relating to the health of yourself and your unborn with respect to the air quality in the workplace.

Although the words "in the same position" were ambiguous, Ms. Heincke took them to refer to the position of spray painter. Mr. Henry, who was no doubt consulted by Mr. Brownell when the latter wrote this letter on behalf of Emrick Plastics, confirmed in his testimony that this was the intended meaning. He also indicated that by this time he had concluded that the Consultant Field Visit Report and the Exposure Assessment Report of May 16 established that there was no health hazard to anyone from the presence of solvents in the paint room. He added that this confirmed "what we had thought in our minds all along."

Ms. Heincke brought the letter and a copy of the Exposure Assessment Report of May 16 to Dr. Jasey. He reviewed the Report and provided another note dated June 4, 1985. It read:

Is pregnant.
Cannot spray paint.
But may work in the packing area or other areas where paint is not involved.

In his testimony, Dr. Jasey explained why the Report had not in any way altered his view that Ms. Heincke could not spray paint. First, the accompanying Consultant Comment by Dr. Malik indicated that the readings in the paint room were unexpectedly low in light of what he observed during his field visit. Second, when the air sampling was conducted only half of the spray booths were operating. Third, the Report only made reference to Threshold Limit Values without taking into account the special position of the pregnant worker.

He also explained that the Report had not altered his opinion that packing would not present an undue risk for Ms. Heincke and the child she was carrying. In his words, "the air quality there is probably as good as the air quality outside [the plant]."

On June 11, 1985 the company responded to the last note from Dr. Jasey by confirming, in a letter signed by Mr. Brownell, its decision not to allow Ms. Heincke to return to work.

While all of these events were occurring, Emrick Plastics hired new employees both in the decorating department which included the packing operation and in the moulding department. The decision to require Ms. Heincke to go on a leave of absence, therefore, was not related to a shortage of work. Leaving Ms. Heincke in packing or transferring her to the moulding department would not have required the employer to lay off or even transfer other employees. It was also common ground that Ms. Heincke had the skills required to pack or to work in the moulding department.

Subsequent to the filing of the complaint under the Human Rights Code by Ms. Heincke, the employer received another Exposure Assessment Report summarizing the findings of the second test of air quality conducted in the decorating department in June, 1985. This time the paint room was in full operation when the samples were taken. Also in contrast to the first test, only one set of samples was taken in the packing area outside the paint room. Dr. Siu explained that it was felt that more extensive sampling in this area was not warranted because significant concentrations of solvents were unlikely.

In the second Report the highest level of toluene detected in the paint room in any one sample was 85 parts per million. This sample was taken directly above the Mask Wash Tank where a designated employee would wash the masks which covered sections of the car parts being painted by the spray painters. In the spray booths themselves the highest concentration found was 28 parts per million. In the packing area, there was less than .2 parts per million. In his testimony, Dr. Siu stated that this was equivalent to a finding that there was no toluene in the packing area.

The second Report also revealed higher concentrations of methyl ethyl ketone in the paint room than had been recorded in the first Exposure Assessment Report. Again, the highest level detected, 167 parts per million, was in a sample of air taken directly above the Mask Wash Tank. In the spray booths themselves the highest concentration found was 91 parts per million. In the packing area, there were less than .3 parts per million. Again, Dr. Siu stated that this was equivalent to a finding that there was no methyl ethyl ketone detected in the packing area.

The Board of Inquiry heard expert testimony from Dr. Siu and Dr. Rieder regarding the two Exposure Assessment Reports and the effects of various solvents, particularly toluene and methyl ethyl ketone, on the health of pregnant workers and the unborn children they carry. Dr. Siu is a senior medical consultant in the Health and Safety Support and Services Branch of the Ministry of Labour who was directly involved in the air quality testing that occurred at Emrick Plastics in 1985. In his view, the first Exposure Assessment Report contained invalid findings regarding the concentration of solvents present in the plant. He explained that there are a number of reasons why such findings may be invalid and that a second test is conducted if the first results are unexpected. The results in the second Exposure Assessment Report accorded with his personal observations of the plant and he believed these to be accurate.

These results revealed that the "Threshold Limit Value - Time Weighted Average" (T.L.V.-T.W.A.) for any solvent was not exceeded in any area tested. Even if it was assumed that a particular worker was exposed to the entire mixture of substances present in one area, the T.L.V.-T.W.A. for the mixture would not be exceeded except perhaps for the employee assigned to wash the masks. Dr Siu explained that the T.L.V.-T.W.A. for a particular substance refers to the concentration for a normal eight-hour day and a forty hour week to which nearly all workers may be repeatedly exposed, day after day, without adverse effect. The T.L.V.-T.W.A. for any particular substance is calculated on the best information available from industrial experience, animal studies and human studies. As more information is acquired, the figure may be changed. The trend has been for such figures to be lowered as more evidence of the adverse effects of a substance becomes available. Dr. Siu stressed that the figure does not represent a fine line between safe and dangerous concentrations but only a guideline used to determine what is acceptable and to indicate when remedial action is required in the workplace. He also stressed that simply because the concentration of a particular substance in the workplace falls below the T.L.V.-T.W.A. does not mean it is a safe environment for a specific individual. He suggested that whether a person should be removed from an industrial exposure should be decided by a competent physician, preferably trained in the field of occupational medicine, who is familiar with the medical history and condition of the individual.

Focusing specifically on toluene and methyl ethyl ketone, Dr. Siu acknowledged that there was still a lack of adequate knowledge regarding the effect of these substances on pregnant women and their offspring. However, he stated that animal studies linked exposure to either of them with an increased risk of fetal abnormalities and retarded growth. He also noted that some studies involving humans revealed that fetal growth would be affected by exposure to toluene. Nevertheless, he believed that the levels of toluene and methyl ethyl ketone to which a spray painter at Emrick Plastics was exposed would not present an unacceptable risk for pregnant workers. Even though the T.L.V.-T.W.A. for a substance is set without regard to the special effects on human pregnancy, Dr. Siu felt that the concentrations of methyl ethyl ketone and toluene detected in the paint room at Emrick Plastics were sufficiently below these levels to be safe. It should, however, be noted that Dr. Siu carefully avoided any suggestion that Dr. Ziter's and Dr. Jasey's advice to Mira Heincke was wrong. Since these doctors knew Ms. Heincke's medical history and had seen her personally, they were in the best position to judge whether she should stop spray painting.

Dr. Rieder, an Assistant Professor of Paediatrics and Pharmacology at the University of Western Ontario, also testified. His expertise includes pharmacology, emergency paediatrics and reproductive toxicology. In addition to his oral testimony, Dr. Rieder prepared a written report which reads in part as follows:

Re: Ontario Human Rights Commission V. Emrick Plastics Ltd.

With respect to the above matter, I have been asked to render my opinion regarding several questions. My opinions are predicated on several assumptions, which are:

- (i) the patient is a pregnant woman working in a spray painting area in a factory manufacturing plastic components;
- (ii) the patient became pregnant in mid-January of 1985;
- (iii) the patient describes the work area as being physically separated from the rest of the plant by a cinder block and plate glass wall, with a three square foot window for a conveyor belt;
- (iv) the spray painting room is ventilated;
- (v) the patient has a respirator available;
- (vi) the patient can smell paint fumes in the spray painting room.

The first question is what advice I would give on February 28, 1985, when the patient presents with the complaint of being unable to work due to nausea, with respect to whether the patient should continue to work in the spray painting room during her pregnancy. At this point, the only information available is that provided by history from the patient.

We are told that the patient works in a factory in Ontario in an area where plastic products are spray-painted, and that she can smell the fumes. The compounds of most concern in such a setting would be the organic solvents, which are chemicals used to dissolve various paint or plastic components. These compounds have been associated with an increased reproductive risk due to occupational exposure in a variety of studies, mostly with respect to an increase in the rates of miscarriages or premature births (Chemically Induced Birth Defects, Marcel Dekker Inc. 1985; 645-58, Residue Rev 1986; 212-43, Neurotoxicol 1986; 421-40, Brit J Indust Med 1987; 527-33, Maternal-Fetal Toxicity, Marcel Dekker Inc. 1990; 191-204).

Thus, the advice that I would give on February 28, 1985, based on the history provided, would be that the patient should request transfer to an area of the factory in which organic solvents were not being used. This is based on the assumption that organic solvents are in use in the paint spraying area, and on evidence that occupational exposure to these agents appears to be hazardous to pregnant women and their unborn offspring, especially in the first trimester. If transfer were not possible, a leave of absence could be arranged. If the

patient continued working in the paint spraying area, given the information available, the physician must be concerned that she would be at increased risk for adverse reproductive outcomes.

The second question is what advice I would give to this patient on March 27, 1985, based on a letter from Mr. K. W. Brownell, the Plant Manager, which states that, as no guarantee can be made of the level of fumes in any area of the plant, the patient would not be permitted to work in any area of the plant. The patient is then offered a nine month leave of absence. Mr. Brownell suggests that the physicians visit the plant so that they can be more specific as to which areas would be acceptable for the patient to work in.

This letter suggests that solvent and/or paint or plastic fumes may be a problem at any area of the plant, and that an increased concentration may not be confined to the spray-painting area. This may well be true. However, it should be noted that the patient has described the odour of fumes in the spray painting area. The human nose is a very sensitive detector of a variety of chemicals, and frequently detects solvents in concentrations well below acceptable threshold levels as suggested by the American Conference of Governmental Industrial Hygienists (ACGIH). Thus, this suggests that exposure levels in areas of the plant where no fumes are detected would be much lower than in the paint spraying area. This would be suggested by the physical description of the area, with apparently limited access to other areas of the plant.

The suggestion that the physicians should visit the plant is frankly unrealistic. In addition to the scheduling difficulties this raises for busy family practitioners and obstetricians, the amount of information that is likely to be obtained from such a visit beyond that available from history is limited, especially in that specialized testing would be required to determine the exact concentrations and compounds present. Additionally, it should be noted that ACGIH has specifically designed their recommended threshold levels to be used by individuals with specific training in industrial medicine (ACGIH TLV Handbook, 1987-88; 2-5).

Thus, my advice with respect to the letter of March 27, 1985, would be that areas of the plant where workers report no odour of fumes are unlikely to be associated with increased reproductive risk from organic solvents, especially if the work being performed involves completed components. A plant visit by the patient's obstetrician or family physician could be performed, but to be of maximal benefit would require specialized testing facilities beyond the capacity of physicians in family or obstetrical practice.

I am then asked to consider the results of Ministry of Labour testing reports from May, 1985, which reports on the air concentration of various organic solvents, and how to respond to a letter from Mr. Brownell, the Plant Manager, dated May 31, 1985. The only solvents detected in any reasonable amount in this testing sequence are toluene and methyl ethyl ketone, which are both present in concentrations below the ACGIH Threshold Limit Value (TLV) Time Weighted Average (TWA). Dr. Malik, an Occupational Hygiene Supervisor with the Ministry of Labour, raises a concern that the values obtained appear to be unusually low, and that repeat sampling would be performed. Mr. Brownell, in a letter of May 31, 1985,

Offers the patient the chance to return to work at the same position if her physician provides a letter absolving Emrick Plastics and management from any and all responsibility relating to the health of the patient and her unborn offspring with respect to air quality in the workplace.

I would agree with Dr. Malik that repeat testing is warranted, especially as in the view of both Dr. Malik and the sampling technician that the concentrations obtained were unusually low. The testing has been helpful, however, in identifying the solvents likely to be of most concern, which would be toluene and methyl ethyl ketone. There are animal and human studies which suggest that these agents can, in sufficient concentration, act as teratogens (J Pediatr 1985; 922-27, Chemically Induced Birth Defects, Marcel Dekker Inc. 1985; 645-58, Residue Rev 1986; 212-43, Neurotoxicol 1986; 421-40, Brit J Industr Med 1987; 527-33, J Med Gen 1989; 333-37, Maternal-Fetal Toxicity, Marcel Dekker Inc. 1990; 191-204). The best-described foetal effects occur with toluene exposure, in which chronic high-dose toluene exposure during pregnancy has been associated with a distinctive embryopathy, in which infants exposed in utero have been noted to have a distinctive combination of microcephaly, central nervous system dysfunction, craniofacial and limb anomalies and growth deficiency (J Pediatr 1985; 922-27, Chemically Induced Birth Defects, Marcel Dekker Inc. 1985; 645-58, J Med Gen 1989; 333-37, Maternal-Fetal Toxicity, Marcel Dekker Inc. 1990; 191-204).

This raises the question of what might be a safe exposure concentration during pregnancy. The question of safe exposure concentrations is often referred to guidelines such as the TLV-TWA guidelines produced by ACGIH. These guidelines have significant limitations when reproductive risk is assessed, limitations that are acknowledged by ACGIH. The TLV-TWA guidelines for toluene and methyl ethyl ketone are based on an 8-hour per day, 5-day per week exposure, and are intended to ensure the health of the worker (ACGIH TLV Handbook, 1987-88; 2-5, Maternal-Fetal Toxicity, Marcel Dekker Inc. 1990; 191-204). These limits may be safe for the worker, but may be hazardous for the developing foetus. This has been shown to be the case for other compounds, such as metallic mercury (Maternal-Fetal Toxicity, Marcel Dekker Inc. 1990; 191-204). Thus, we have some concern that, although the compounds are present in concentrations below the TLV-TWA, an increased reproductive risk is not excluded.

ACGIH, as noted, recognizes the limitations of TLV-TWA guidelines in the preamble to the table of TLV-TWA values. They describe the wide variations in susceptibility possible among workers, and indicate that the TLV-TWA guidelines may not adequately protect some workers (ACGIH TLV Handbook, 1987-88; 2-5).

The request by Mr. Brownell for a letter absolving Emrick Plastics of "any and all responsibility relating to the health of yourself and your unborn with respect to the air quality in the workplace" is unreasonable. Blanket statements covering such a broad range of possibilities as does this suggested letter are too general. A physician cannot be reasonably expected to provide such a blanket guarantee, especially given the uncertainty as to what air concentration might be safe for the unborn foetus and especially as the physician has no control over air quality. Dr. Malik's comments further suggest

that such a letter from one of the patient's physicians would be inappropriate.

I am then asked to consider the results of the repeated testing suggested by Dr. Malik, performed in July of 1985. This testing demonstrates higher concentrations of methyl ethyl ketone and toluene in the spray painting area, as well as finding acetone present in the air in detectable concentrations in the spray painting areas.

The airborne concentrations for the solvents obtained during this testing session are higher than in the previous testing. It should be noted that airborne concentrations of these solvents in the packing area are significantly lower than in the spray painting area.

The question of the patient continuing to work in the spray painting area during the remainder of her pregnancy is controversial. As described, there are concerns regarding increased miscarriage rates among pregnant workers who have occupational exposure to organic solvents. This concern would be less pressing in May, when the patient is in the second trimester. However, there remain concerns regarding increased incidence of prematurity and an increased rate of malformations, especially involving the central nervous system, among pregnant workers in these settings. Thus, given the uncertainty of safety and concerns raised from data published in the peer-reviewed literature, it would be prudent to be cautious in this case, and it would be reasonable to advise that the patient avoid working in the spray painting area for the remainder of her pregnancy. As described above, there are almost undetectable concentrations of the solvents in the packing area. If a position was available in the packing area, it would be reasonable and prudent to recommend that the patient be allowed to work in this area rather than in the spray painting area.

It should be noted that none of the measured air concentrations exceeded the ACGIH TLV-TWA guidelines. As discussed above, these guidelines are designed to protect the health of the worker, and do not address the health of the unborn foetus. As outlined by ACGIH, these guidelines do not apply to all workers, and individual susceptibility to adverse effects may vary considerably.

The question of protective equipment should be considered. Respirators are available in this area, although from the Ministry of Labour report of July 1985 it appears that they were not worn by all workers in the area. The respirators, depending on their design, would be expected to exclude particulate material and some smokes. They may be less effective when dealing with organic solvents. Additionally, some absorption of these agents can occur cutaneously. Thus, the availability of respirators would not change my recommendations.

In summary, my advice to this patient would, in the situations described above, be to seek arrangements by which she would not be required to work in the paint spraying area for the balance of her pregnancy. Further exposure in the spray painting area may increase the risk of an adverse outcome for her pregnancy. The patient could continue to work in an alternate position in an area in which organic solvent vapours are not being used.

Dr. Rieder carefully explained this Report and the basis for his opinions in oral testimony. In his view, spray painting represents

a real and unacceptable risk for a pregnant worker and her unborn child, especially in the early stages of pregnancy. Although he would have reached this conclusion without the results from the air quality tests, these results confirmed rather than weakened his view. He also indicated that packing or other work outside the paint room did not risk exposing the pregnant worker to unacceptable levels of the organic solvents used in the paint. Again, he believed that the air quality tests supported this position although he would have reached it without them.

During cross-examination, Dr. Rieder was asked if he would have concerns regarding the health of a pregnant worker and her unborn child whenever the smell of toluene (like airplane glue) or methyl ethyl ketone (like nail polish) can be detected in the work area. He replied that he would be concerned since this would be evidence of the presence of these solvents in the air, although the level of concentration might be low. However, he added that much would depend on the strength and frequency of the odour.

Subsequently, Mr. Henry and Mr. Brownell testified that there were paint fumes in the packing area although they were not nearly as intense as those in the paint room. Mr. Henry went so far as to say that one could smell paint fumes everywhere in the plant. On the other hand, Ms. Heincke had told her doctors that there were no noticeable paint fumes outside the paint room. She repeated that observation in her testimony. Ms. Westworth, who has worked at Emrick Plastics for over fourteen years, testified that there were no noticeable odours or fumes at the moulding machines. She did not indicate whether she had noticed smells in the packing area.

Regarding this factual issue, I conclude that there were no noticeable paint fumes in the packing area for any prolonged period of time. I do so for several reasons. First, Ms. Heincke had been warned specifically by Dr. Ziter about paint fumes. She was obviously concerned about the health of her unborn child and she would not have been content to pack for three weeks if she had detected continuous paint fumes there. Second, Dr. Siu visited the plant in April 1985 and concluded that the exposure to solvents outside the paint room would be minimal. He would not have reached this conclusion if he had noticed significant paint fumes in the rest of the plant. Third, the second series of air quality tests revealed that the amount of toluene and methyl ethyl ketone in the packing area was virtually undetectable by the measuring equipment used by the Ministry of Labour. It is, of course, true that the first set of tests revealed levels of these solvents in the packing area which might be detectable by the human nose. However, as Dr. Siu explained, something had obviously gone awry with that study.

As noted above, there was some disagreement between Dr. Si and Dr. Rieder regarding the question whether the concentrations of toluene and methyl ethyl ketone detected in the spray booths in the second Exposure Assessment Report presented an undue risk for pregnant workers and the unborn children they carry. Dr. Si concluded that the risk of exposure was generally acceptable for pregnant women, although specific individuals might well be advised to avoid it based on their medical history. Dr. Rieder, on the other hand, stated that exposure to these levels of concentration of organic solvents posed a risk to a pregnant worker and her unborn child which should be avoided if possible, especially in the early stages of pregnancy. He would advise his patients to seek alternative work for the duration of the pregnancy.

Although it might not be strictly necessary to choose between these opinions to resolve this particular case, I find Dr. Rieder's view more persuasive for several reasons. First, he has more expertise in the area of reproductive toxicology than Dr. Siu. Second, his testimony revealed a more careful and detailed analysis of the risks. For example, he differentiated between the various stages of pregnancy, while Dr. Siu spoke generally about the risks throughout pregnancy. Third, Dr. Rieder exhibited more familiarity with the literature regarding the effects of toluene and methyl ethyl ketone on the unborn child. Finally, Dr. Rieder's more cautious approach is appropriate since there is much still to be learned about the negative effects of these organic solvents and an error in judgement can have horrendous effects.

The Law

Since the events which are the subject of the complaint occurred in 1985, the applicable substantive law is contained in the Human Rights Code, 1981, S.O. 1981, C. 53 as amended by S.O. 1984, C. 58, S. 39. At that time the Code did not specifically state that discrimination on the basis of sex included discrimination because a woman was pregnant. However, it was accepted by all the parties that Brooks v. Canada Safeway (1989), 10 C.H.R.R. D/6183 (S.C.C.) conclusively established that, even in the absence of such a provision, discrimination on the basis of pregnancy constitutes discrimination on the basis of sex. Accordingly, if the respondents discriminated against Ms. Heincke because she was pregnant this would constitute a denial of her right under S. 4(1) of the Code to equal treatment with respect to employment without discrimination because of sex unless one of the defences set out in the Code applied.

Discrimination contrary to the Ontario Human Rights Code in 1985 could take the form of direct discrimination or adverse effect

discrimination. In O'Malley v. Simpson-Sears (1986), 7 C.H.R.R. D/3102 (S.C.C.), the events giving rise to the complaint arose in 1978. At that time the Code did not expressly deal with adverse effect or constructive discrimination. Nevertheless, the Supreme Court of Canada held unanimously that adverse effect discrimination could constitute discrimination contrary to the Code. Regarding the distinction between direct and adverse effect discrimination, Mr. Justice McIntyre, speaking for all members of the court, observed (par. 24772):

A distinction must be made between what I would describe as direct discrimination and...adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here"...On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon one employee or a group of employees in that it imposes, because of some special characteristics of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force...An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

Mr. Justice McIntyre went on to hold that where a practice or rule which is itself neutral causes adverse effect discrimination, it is incumbent upon the employer to make reasonable efforts to accommodate those employees adversely affected (par. 24777):

Where direct discrimination is shown the employer must justify the rule, if such a step is possible under the enactment in question, or it is struck down. Where there is adverse affect discrimination on account of creed [the prohibited ground in issue in O'Malley] the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect on them rather than the general work force which must be considered. In such cases there is no question of justification raised because the rule, if rationally connected to employment, needs no justification; what is required is some measure of accommodation. The employer must take reasonable steps towards that end which may or may not result in full accommodation.

Regarding the burden of proof on this issue, McIntyre J. stated (par 24782):

Where adverse effect discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job...the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship. It seems evident to me that in this kind of case the onus will again rest on the employer, for it is the employer who will be in possession of the necessary

information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence.

As mentioned earlier, the O'Malley case dealt with the Ontario Human Rights Code as it stood in 1978. By 1985, the Code contained an express provision dealing with adverse effect or constructive discrimination. S.10 provided:

A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that could result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom a person is a member, except where

- (a) the requirement, qualification or consideration is a reasonable and bona fide one in the circumstances;

or

- (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

This section was amended in 1986. Among other changes, a new subsection 2 was inserted. It reads:

The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

These statutory amendments, in my view, essentially confirmed the approach which the Supreme Court of Canada adopted in O'Malley. In particular, S. 10 as it stood in 1985 clearly specified that adverse effect or constructive discrimination on a prohibited ground was contrary to the Act unless a defence was established. S. 10(a) provided a defence if the requirement, which was neutral on its face, was a "reasonable and bona fide one in the circumstances". Although a later amendment made it explicitly clear that the issue of accommodation had to be considered in determining whether this defence applied, this was already implicitly indicated in the 1985 legislation. A requirement could not be described as "reasonable and bona fide" if the needs of the affected group or individual could be accommodated reasonably in the circumstances. In determining whether such accommodation was possible in particular circumstances, relevant factors include financial cost, the interchangeability of the work force, health and safety requirements, and the disruption of a collective agreement.

Ms. Heincke's complaint, as amended, alleged both direct and constructive discrimination. At the hearing, the Commission also argued that the respondents' actions in 1985 constituted both forms of discrimination. I prefer to analyze the case in terms of constructive discrimination for several reasons. First, the essence of the complaint, both in its original and amended form, was that Emrick Plastics should have accommodated the special needs and circumstances relating to Ms. Heincke's pregnancy by moving her out of the paint room and assigning her to other duties. Second, to describe the decision to ask Ms. Heincke to take a leave of absence as direct discrimination ignores the context in which this decision was made. If Ms. Heincke had not raised concerns regarding the effect of spray painting and stated that she would no longer spray paint, there is nothing to indicate that Emrick Plastics would not have permitted her to continue spray painting until she went on pregnancy leave in accordance with the collective agreement. Ms. Heincke, of course, no longer wanted to spray paint once she learned that she was pregnant and she asked her employer to accommodate her. At first the employer acceded to this request, but later refused to do so. The issue is whether this subsequent refusal constituted an infringement of Ms. Heincke's rights under Part I of the Human Rights Code.

In 1985 Emrick Plastics organized its work force in such a way that generally all employees whose primary job consisted of spray painting were required to spray paint if this work was available. They could not readily move into another job. It is not disputed that this rule was adopted for genuine business reasons and that it was rationally related to the efficient operation of the plant. This rule did not on its face discriminate on a prohibited ground and it was consistently applied to all spray painters.

However, if imposed on all spray painters including those who were pregnant, this rule dictated that pregnant workers had to bear a risk which non-pregnant workers did not face. In particular, the pregnant worker's exposure to organic solvents such as toluene and methyl ethyl ketone resulted in an increased risk of miscarriage and fetal abnormalities. This risk could not (and still cannot) be quantified with any precision and it might not have been mathematically high particularly in light of Emrick Plastics' modern and efficient ventilation system. Nevertheless, there is no doubt that many pregnant workers would reasonably choose not to accept the risk, especially when so advised by their physicians. It is also clear that this would have been the advice normally given by family physicians and obstetricians at the time when Ms. Heincke's pregnancy was discovered. At that time no air quality tests were available to indicate the level of concentration of

organic solvents in the paint room. It was, however, common knowledge among those familiar with the plant that there was a strong smell of paint fumes including the distinctive odours of toluene and methyl ethyl ketone in the room. Spray painters were, therefore, exposed to some, then unknown, levels of organic solvents when they breathed and when the paint contacted their skin.

In summary, rigid application in the first months of 1985 of the rule that spray painters would only be assigned spray painting would effectively exclude Ms. Heincke and other pregnant spray painters who were aware of the risk from employment at Emrick Plastics. This would constitute constructive discrimination on the basis of sex contrary to S. 10 and S. 4(1) of the Human Rights Code in effect at that time, unless the rule could be justified under S. 10(a). Therefore, Emrick Plastics had, in accordance with the O'Malley case and my reading of S. 10(a) of the Code, a duty to take reasonable steps to accommodate Ms. Heincke once she informed the employer that, on her doctor's advice, she would no longer spray paint for the duration of her pregnancy.

To its credit Emrick Plastics did initially accommodate Ms. Heincke's special needs and circumstances by moving her out of the paint room and assigning her to packing. However, approximately three weeks later, Mr. Brownell informed her that she had to take a leave of absence without pay until six weeks after the birth of her child. This action was not prompted by Ms. Heincke's inability to perform the job of packer. Indeed, both Mr. Brownell and Mr. Henry testified that her work was clearly satisfactory. Nor did the respondents attempt to argue that this decision was related to a shortage of work, financial cost, the disruption of the collective agreement then in effect, or problems relating to the interchangeability of the work force. Rather, it was suggested that the decision was justified by two related factors. First, the respondents argued that they had no choice but to ask Ms. Heincke to leave the plant because of the restrictions placed on her employment by her doctors. Second, the respondents' concerns about the air quality in the plant were said to preclude them from continuing to employ Ms. Heincke as a packer.

Much was made of alleged ambiguity in the note from Dr. Ziter and the first note from Dr. Jasey. Dr. Ziter's note stipulated that Ms. Heincke was "to work in an area where no paint fumes will be inhaled." Dr. Jasey's first note indicated that it was advisable for Ms. Heincke "to work in another area where the concentration of fumes is less than in the area where she spray paints." I agree that more extensive, more carefully written notes

indicating which areas of the plant were considered acceptable to the doctors would, no doubt, have been more helpful. However, I cannot accept that these notes dictated the employer's actions. Dr. Ziter's note began by advising that Ms. Heincke could return to work in the Emrick Plastics plant. Dr. Jasey's note clearly did not specify that even the slightest risk of the inhalation of paint fumes had to be avoided. Moreover, if the respondents wished more guidance from Dr. Jasey, they could have asked him for clarification of his position. Instead, the respondents immediately required Ms. Heincke to take a leave of absence once she presented this note.

In any event, Dr. Jasey's second note, written only one day after the first, was clear and precise. He explicitly wrote that Ms. Heincke could continue working in the packing area. Yet, this note did not cause the employer to rescind the decision made the previous day. The suggestion that the employer's actions were dictated by the doctors' notes is simply not supportable on the facts.

Mr. Brownell and Mr. Henry testified that the decision to require Ms. Heincke to go on leave of absence was made because of a concern regarding the quality of the air in the packing area and elsewhere in the plant. Having been alerted by the notes from Dr. Ziter and Dr. Jasey to the dangers of paint fumes for Ms. Heincke and her unborn child, they worried that there might be health risks in all areas of the plant. This concern was not alleviated by Dr. Jasey's second note because they felt the doctor did not have enough information regarding the air quality in the packing area.

Did the respondents' concerns justify their refusal to accommodate Ms. Heincke by allowing her to continue to pack? Earlier I indicated that health and safety considerations could be taken into account in assessing whether a worker's special needs and circumstances could be reasonably accommodated. There may well be situations where concerns about the health of a pregnant woman and her unborn child preclude any reasonable accommodation of a pregnant worker. In this case, however, the respondents have failed to establish that continued employment in the packing area presented an undue risk to either Ms. Heincke or her child.

The only basis suggested for the respondents' concerns was the presence of paint fumes in the packing area. I have already concluded that there were no noticeable paint fumes in that area for any prolonged period of time. Moreover, Dr. Jasey, Dr. Siu and Dr. Rieder all testified that there was no real risk of exposure to any significant concentrations of organic solvents in the packing

area. To some extent, this testimony was based on the results of the air quality tests. Obviously, this information was not available to Mr. Brownell or Mr. Henry in March 1985. However, Dr. Jasey had formulated the opinion that the air quality in the packing area was acceptable when he wrote the notes for Ms. Heincke in March 1985. Also, Dr. Siu had concluded during his visit to the plant in April 1985 that exposure to organic solvents would be minimal outside the paint room. I find that there was no objective basis in March 1985 for the concerns expressed by Mr. Brownell and Mr. Henry regarding the quality of the air in the packing area. The subsequent air quality tests confirm this.

Even if the respondents had good reason to be concerned about the quality of the air in the packing area, it would not necessarily follow that they could not have reasonably accommodated Ms. Heincke. Providing a respirator for Ms. Heincke while she packed could have alleviated most of the concern. Moreover, Ms. Heincke might have been given other work further away from the paint room. The evidence indicated that Ms. Heincke could operate a moulding machine and that the employer was hiring in the moulding department. Yet, the respondents never seriously considered the possibility that Ms. Heincke be moved into that department.

In conclusion, the decision by Mr. Brownell and Mr. Henry on behalf of Emrick Plastics in March 1985 requiring Ms. Heincke to take a leave of absence constituted a violation of the duty to reasonably accommodate the special needs and circumstances of Ms. Heincke as a pregnant worker. This duty arose because the application of the rule that spray painters were required to spray paint would effectively exclude Ms. Heincke and other pregnant spray painters from employment at Emrick Plastics. Because the respondents were not able to establish that it was unreasonable to modify this rule by allowing Ms. Heincke to pack or to work in another area of the plant, the rule cannot be described as "reasonable and bona fide in the circumstances" for the purpose of the defence established by S. 10(a). Accordingly, the decision requiring Ms. Heincke to take a leave of absence infringed her right to equal treatment with respect to employment without discrimination because of sex as guaranteed by S. 4(1) and S. 10 of the Code in effect at that time.

After Emrick Plastics received the first Exposure Assessment Report in May 1985, the company offered to allow Ms. Heincke to return to her position as spray painter provided her doctor agreed. By this time the employer had apparently concluded that the Report established that there was no health hazard to a pregnant worker in the paint room. Ms. Heincke, on the advice of Dr. Jasey, refused

this offer. Dr. Jasey again indicated in a note that Ms. Heincke could not spray paint but that she could work in the packing area or any other area where paint was not involved.

The offer of a position as spray painter in May 1985 did not terminate the infringement of Ms. Heincke's right to equal treatment under the Code. Admittedly, it provided Ms. Heincke with a choice. She could agree to paint or stay on leave. However, requiring Ms. Heincke to spray paint if she wanted to return to work during her pregnancy constituted adverse effect discrimination. Spray painting, as I found earlier, presented a risk for pregnant workers and the unborn children they carried. Even though, as Dr. Rieder explained, that risk might be lessened as the pregnancy progressed, a pregnant woman would reasonably choose to avoid it. This would be especially true given the information available in May 1985. At that time it was known that toluene and methyl ethyl ketone were present in the paint room. However, there was uncertainty regarding the levels of concentration. This uncertainty had not been eliminated by the first Exposure Assessment Report. While the levels of the organic solvents recorded in the Report were relatively low, the results were suspect. At the time of the test only one-half of the paint booths were operating. Moreover, the Report was accompanied by a Consultant Comment by Dr. Malik indicating that the readings were suspect because they did not coincide with his expectations based on a personal visit to the plant.

In summary, the job offer in May 1985 indicated that the employer now insisted in imposing the requirement that all employees whose primary job consisted of spray painting would spray paint. This rule effectively excluded Ms. Heincke as a pregnant worker from employment at Emrick Plastics. The first Exposure Assessment Report did not establish that it was safe for pregnant workers to spray paint at Emrick Plastics. Requiring Ms. Heincke to spray paint or stay on leave of absence, therefore, constituted constructive discrimination on the basis of sex contrary to S. 10 and S. 4(1) of the Human Rights Code in effect at that time because, as I found earlier, this requirement could not be justified under S. 10(a).

Accordingly, I find that Mr. Brownell infringed Ms. Heincke's right to equal treatment with respect to employment without discrimination because of sex as guaranteed by S. 4(1) and S. 10 of the Ontario Human Rights Code in effect in 1985. Pursuant to S. 44(1), Mr. Brownell's acts in the course of his employment are deemed to have been done by Emrick Plastics. Moreover, Mr. Brownell's actions were only taken after consultation with and

authorization by Mr. Henry who represented senior management at Emrick Plastics. Accordingly, Emrick Plastics also infringed Ms. Heincke's right.

Remedy

S. 4 (1)(b) permits a board of inquiry to order a party who has infringed the right of a complainant "to make restitution, including monetary compensation, for loss arising out of the infringement." This paragraph also stipulates that "where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish."

As a result of the respondents' denial of Ms. Heincke's right to equal treatment in employment, the complainant suffered economic loss in the form of lost wages. She was required to take a leave of absence at the end of March 1985 and did not return to work at Emrick Plastics until six weeks after the birth of her child on October 7, 1985. The Commission submitted that the lost wages amounted to \$10,569, based on the assumption that Ms. Heincke would not have begun maternity leave until September 21, 1985 if the employer had accommodated her by allowing her to work in the packing area. The respondents did not quarrel with the formula used by the Commission to calculate Ms. Heincke's lost wages but argued that Ms. Heincke would have begun pregnancy leave on July 6, 1985 because the collective agreement then in force at Emrick Plastics required all pregnant workers to take such leave after six months of pregnancy.

The evidence indicated that Ms. Heincke's health during the pregnancy was generally good and that she would have been able to work until a few weeks prior to the birth of her child. Ms. Heincke also testified that she would have liked to have begun her maternity leave as late as possible so that she could spend most of it at home with her newborn. If she had been allowed to, Ms. Heincke would have continued to work in the packing area until September 21, 1985. However, as mentioned earlier, it is probable that she would have been obligated to begin pregnancy leave sometime in early July under the terms of the collective agreement. Nevertheless, Emrick Plastics should be precluded from relying on this fact because the terms of the collective agreement dictated a contravention of the Ontario Human Rights Code then in effect. Requiring all pregnant workers to take a leave of absence without pay regardless of their individual circumstances (including their ability to continue to do their work) would constitute direct discrimination on the basis of sex contrary to S. 4(1). I, therefore, find that Ms. Heincke is entitled to an award of \$10,569

for lost wages consequent upon the respondents' denial of her right to equal treatment in employment.

The Commission argued that Ms. Heincke was entitled to general damages suffered as a result of the actions of the respondents. The amount suggested was \$3,000. It is clear that Ms. Heincke was quite upset by the employer's action. During her testimony five years later, she still became very emotional and distraught when describing the events of 1985 and her reaction to them. The joy she experienced anticipating the birth of her first child was considerably dampened by the fact that she had to leave her job for unjustified reasons. Also, she was required to return to work only six weeks after the birth of her child since the collective agreement limited pregnancy leave to a maximum nine months. She was, therefore, unable to spend her maternity leave with her daughter at home after the child was born. This led to a decision not to breast feed the child. In the circumstances of this case, an award of \$3,000 for general damages is appropriate.

The Commission also sought an award of \$1,000 in the nature of punitive damages. While there is some authority for the proposition that a board of inquiry has jurisdiction under the Code to award such damages (see Cameron v. Nel-Gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 (Professor Cumming)), punitive damages would not be appropriate in this case. First the events occurred at a time when it was uncertain whether discrimination on the basis of pregnancy constituted a violation of the Code and whether an employer had a duty to accommodate the special needs and circumstances of a pregnant worker. Second, there is no need in this case to award such damages to deter repetition of this type of infringement. Soon after the events occurred, a new collective agreement was signed by Emrick Plastics requiring it to accommodate pregnant workers and the evidence indicates that Emrick Plastics has routinely accommodated such workers since then.

The Commission requested that interest be payable in respect of any award. Although there is no express provision in the Code regarding payment of interest on compensatory awards, a board of inquiry's jurisdiction to order such payment appears clearly established: Olarte v. Rafael DeFilippis and Commodore Business Machines Ltd. (1983), 4 C.H.R.R. D/1705 (Professor Cumming); Cameron, supra; and Foster Wheeler v. O.H.R.C. and Scott (1987), 3 C.H.R.R. D/4179. Using the Courts of Justice Act, S.O. 1984, c.11 as a guide, I fix the rate at 11% per annum, not compounded. The commencement date for interest will be July 21, 1985 as requested by the Commission. It is clear that by that time the respondents had received notice of the complaint.

ORDER

This Board of Inquiry, having found that the complainant's right to equal treatment with respect to employment without discrimination because of sex was infringed by Mr. Kenneth Brownell and Emrick Plastics contrary to S. 10 and S. 4(1) of the Ontario Human Rights Code, 1981, S.O. 1981, C. 53, orders the following:

1. Emrick Plastics, a Division of Windsor Mold Inc., must pay forthwith to Ms. Mira Branton:
 - (a) as damages for lost wages, the sum of ten thousand five hundred and sixty-nine dollars (\$10,569.00);
 - (b) as general damages, the sum of three thousand dollars (\$3,000.00); and
 - (c) as interest in respect of the awards of damages, the sum of seven thousand eight hundred and thirty-six dollars and ten cents (\$7,836.10).

Dated at the City of London in the County of Middlesex this 15th day of October, 1990



Berend Hovius
Board of Inquiry

